

A Modern Approach to Pay Disparities in the Workplace

Author : Joseph Seiner

Date : January 18, 2018

Stephanie Bornstein, *Equal Work*, 77 **Md. L. Rev.** (forthcoming 2018), available at [SSRN](#).

In her article, *Equal Work*, Professor Stephanie Bornstein (Florida) does a superb job of providing a fresh approach to the continuing problem of pay discrimination in the workplace on the basis of gender and race. As Professor Bornstein correctly acknowledges, pay discrimination has remained an ongoing problem in our society for decades. Her article makes two extraordinarily useful contributions: first, it undertakes a comprehensive survey of the latest literature on pay discrimination and its causes, and second, it offers solutions that do not require legislative reform to chip away at this pervasive problem.

Early in her article, Professor Bornstein provides a comprehensive review of the existing data on gender and pay discrimination in the United States. This overview does a nice job of bringing together all of the most up-to-date research in this area. Then, Professor Bornstein makes an effort to explain why the pay gap continues to exist in the course of exploring recent research on occupational segregation and income inequality in this country. To this end, Professor Bornstein also addresses the complexities of the law on pay discrimination in the workplace, closely examining Title VII of the Civil Rights Act of 1964 and the Equal Pay Act (EPA), before discussing recent efforts on the state level to resolve these problems, including statutes passed in California, Massachusetts, and Oregon. The paper also correctly recognizes the many efforts to close the race and gender pay gap that have been made over many decades and at all levels — federal, state, and local. While some of these efforts have helped reduce pay disparities at different points in our nation’s history, the gap remains persistent and efforts to fix the problem have stalled in recent years.

Thus, Professor Bornstein provides an exhaustive descriptive review of the research in this area, the most current data, and an analysis of the basis for the problem. For this reason alone, the paper promises to serve as a seminal work in this area that other scholars can look to when examining different aspects of this topic. The greatest contribution of this work, however, is Professor Bornstein’s unique approach to helping to resolve these unfair pay disparities. Professor Bornstein’s proposal focuses on the first, threshold prong of the statutory test under the EPA — that the statute requires equal pay for “equal work.” This analysis distinguishes her scholarship from much of the other literature on this topic, which often focuses more on the possibility of narrowing the employers’ “any factor other than sex” defense in the statute.

In this way, the article suggests a new approach to addressing the pay problem. Noting the difficulty of bringing legislative reform to this area, this article discusses ways of addressing pay discrimination problems through existing legal frameworks. By way of example, the article explores how employers in the union and governmental sectors have found ways to create equal pay systems that do a better job than non-union private sector workplaces of paying minorities and women equally to what they pay white men. Professor Bornstein’s approach plays off these examples, arguing that employers must make broader comparisons between workers when reaching pay determinations. Her approach thus advocates that “every difference between jobs [created by an employer] need not be wage-determinative.” This approach explains how the current narrow interpretation of the law is outdated, and how a more comprehensive approach — which applies a broader framing of what constitutes equal work — is now critical to the modern workplace. The unique strength of this piece, then, is its detailed

explanation of how we can work *within* existing legal structures to better protect women and minorities from pay discrimination. The paper thus avoids some of the practical pitfalls that can befall proposals for broad legislative reform in this area.

It is difficult to overstate the important contribution Professor Bornstein makes here with *Equal Work*. The vast collection of data on the topic and the exhaustive background information provided are by themselves quite impressive. However, the novel approach to helping fix the problem advocated by Professor Bornstein makes this work an invaluable contribution to the academic literature.

Cite as: Joseph Seiner, *A Modern Approach to Pay Disparities in the Workplace*, JOTWELL (January 18, 2018) (reviewing Stephanie Bornstein, *Equal Work*, 77 **Md. L. Rev.** (forthcoming 2018), available at SSRN), <https://worklaw.jotwell.com/modern-approach-pay-disparities-workplace/>.